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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 TAMMY JOHNSON and VANESSA
12 DETTWILER,

13 Plaintiffs,

14 v.

15 TRACTOR SUPPLY COMPANY,

16 Defendant.

CASE NO. 3:17-cv-06039-RJB

ORDER ON (1) PLAINTIFFS'
MOTION FOR VOLUNTARY
DISMISSAL (2) PLAINTIFFS'
MOTION TO SEAL UNREDACTED
DECLARATION OF MICHAEL
MALK AND (3) DEFENDANT'S
MOTION TO STRIKE

17 THIS MATTER comes before the Court on Plaintiffs' Motion for Voluntary Dismissal
18 (Dkt. 26), and two related motions, Plaintiffs' Motion to Seal Unredacted Declaration of Michael
19 Malk (Dkt. 28) and Defendant's Motion to Strike (Dkt. 37). The Court has considered the
20 motions and the remainder of the file herein.

21 A. BACKGROUND.

22 Filed on December 12, 2017, this putative class action centers on allegations that
23 Defendant failed to provide adequate meal and rest breaks to non-exempt employees in violation
24

1 of federal and state wage and hour laws. Dkt. 1 at ¶1.1. *See* 29 U.S.C. §207, RCW 49.46.130,
2 RCW 49.52.050, RCW 49.12.020, and WAC 296-126-092. The Complaint alleges one claim for
3 violations of the Federal Labor Standards Act (FLSA), and federal question jurisdiction under 28
4 U.S.C. § 1331. Supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) is alleged for three
5 Washington state law claims.

6 The Court has granted two stipulated continuances, the second of which stayed formal
7 discovery and tolled the statute of limitations to accommodate an October 24, 2018 mediation. Dkt.
8 23 at 2.

9 On November 21, 2018, after the mediation failed to resolve the case, Plaintiffs filed the
10 pending motion to dismiss. Dkt. 26. With that motion and pursuant to a stipulated protective order,
11 Dkt. 25, Plaintiffs *pro forma* filed a motion to seal certain paragraphs of the Declaration of Michael
12 Malk. Dkt. 28. *See* Dkt. 27. In response to the motion to seal, Defendant filed a motion to strike,
13 seeking to strike the declaration and references to and information gleaned from the October 24,
14 2018 mediation. Dkt. 36.

15 B. DISCUSSION.

16 Before reaching the merits of Plaintiffs' motion to dismiss, the Court must first address the
17 two related motions.

18 **1. Motion to Seal and Motion to Strike.**

19 At the center of both motions is the Declaration of Michael Malk, attorney to Plaintiffs. Dkt.
20 27. The declaration recounts from Mr. Malk's perspective what occurred in preparation for and at the
21 October 24, 2018 mediation. *See id.* at 1-3. Plaintiffs have partially redacted one paragraph of Mr.
22 Malk's declaration, paragraph five (5), which is redacted as follows (XXX denotes redaction):

23 In preparation for mediation, plaintiffs calculated the potential wage damages for each claim.
24 Plaintiffs were surprised to learn that the estimated total wage damages for the approximately
XXX Washington class members for the Washington rest and meal break claims exceeded
the estimated total wage damages for the approximately XXX potential FLSA collection

1 action members by nearly XXX. Plaintiffs calculated that each FLSA plaintiff in this action
2 would receive on average less than XXX in wage damages. The potential wage damages for
Washington employees . . . also turned out to be trivial.

3 Dkt. 27 at ¶5.

4 Defendant seeks to strike Mr. Malk's declaration in its entirety, including all references to
5 what Defendant defines as "mediation information." Dkt. 36 at 1. Defendant requests in the
6 alternative that, at a minimum, Plaintiffs' motion to seal be granted. *Id.* Defendant argues that
7 Plaintiffs' reliance on information in Mr. Malk's declaration is improper for three reasons: (1) the
8 information is subject to mediation privileges under state and federal law; (2) the information is
9 inadmissible evidence under ER 408, which disallows evidence of compromise offers and
10 negotiations; and (3) the information is confidential under the terms of a mediation agreement. *Id.* at
11 4.

12 According to Plaintiffs, the information cited to is "rudimentary" and "otherwise
13 discoverable." Dkt. 39 at 4. Allowing the information to remain sealed, Plaintiffs urge, stretches the
14 common law mediation privilege and mediation agreement beyond recognition and common sense.
Id. at 2, 3.

15 In this Court's view, Defendant goes too far seeking to preclude reference to broadly-defined
16 "mediation information." Nonetheless, redactions to Mr. Malk's declaration, Dkt. 27, are not
17 inappropriate under the circumstances. With formal discovery stayed, Plaintiffs explicitly asked for
18 specific information "for purposes of mediation," such as that used to calculate the number of
19 potential class members and wage damages. Dkt. 37 at 7, 10, 14. Particularly where, as here, the
20 information redacted was gained through mediation and is immaterial to the merits of the pending
21 motion to dismiss, redaction is allowable.

22 Plaintiff's motion to seal should be granted. The unredacted declaration of Mr. Malk, Dkt.
23 29, should remain under seal. To that extent, Defendant's motion to strike should be granted.

24 Defendant's motion to strike should otherwise be denied without prejudice.

1 No finding about these two motions should be construed to limit findings by State courts in
2 future proceedings.

3 **2. Motion for Voluntary Dismissal.**

4 Plaintiffs seek voluntary dismissal without prejudice under Rule 41(a), which gives
5 courts discretion to dismiss “on terms that the court considers proper.” Fed. R. Civ. P.
6 41(a)(1)(B)(2). Having attempted mediation, Plaintiffs represent, Plaintiffs “have decided not to
7 further pursue their bonus-overtime claims under the FLSA or Washington law,” based on the
8 prospect of years of costly litigation and the risk that Defendant may prevail on the FLSA claim.
9 Dkt. 27 at 2, 3. Voluntary dismissal without prejudice “would be a better use of litigation and
10 judicial resources,” Plaintiffs argue. *Id.*

11 According to Defendant, Plaintiffs’ motion amounts to “a purely elective strategy
12 decision designed to move the litigation . . . to state court[.]” Dkt. 40 at 1. Defendant contends
13 that Plaintiffs are not motivated by judicial economy, but rather are seeking a more favorable
14 forum for strategic reasons, given recent precedent favorable to Plaintiffs in State court and
15 adverse to Plaintiffs in federal court. *Id.* at 4-7. Defendant seeks \$7,850 in attorneys’ fees,
16 acknowledging that although Rule 41(a) “may permit . . . duplicative litigation in state court, it
17 also allows the Court to condition the dismissal on reimbursing Defendant for wasted attorney’s
18 fees incurred by such duplicative litigation.” *Id.* 1, 2. The fees sought by Defendant relate only to
19 case management and scheduling of this case and responding to Plaintiffs’ motion for voluntary
20 dismissal. *Id.* at 7-10.

21 Plaintiffs’ request for voluntary dismissal should be granted. It does not appear that
22 Defendant opposes dismissal *per se*, but rather, opposes the extra costs associated with ending
23 this case and re-filing in State court.

1 Defendant's request for attorneys' fees should be denied. Judging by Defendant's workup
2 for the mediation, *see* Dkt. 37 at 23-36, it would appear that the bulk of attorney work in this
3 case thus far has had nothing to do with voluntary dismissal. Other than issuing orders on
4 stipulated motions and the motions addressed by this Order above, the Court has not reached the
5 merits on any substantive issues and is reluctant to tilt the balance of attorneys' fees in favor of
6 one party over another.

7 THEREFORE, it is HEREBY ORDERED:

8 (1) Plaintiffs' Motion for Voluntary Dismissal (Dkt. 26) is GRANTED. The case is
9 DISMISSED WITHOUT PREJUDICE. Defendant's request for attorneys' fees is
10 denied.

11 (2) Plaintiffs' Motion to Seal Unredacted Declaration of Michael Malk (Dkt. 28) is
12 GRANTED. Docket 29 shall remain sealed.

13 (3) To the extent Defendant's Motion to Strike (Dkt. 37) requests that Docket 29 remain
14 sealed, the motion is GRANTED IN PART. The motion is OTHERWISE DENIED
15 WITHOUT PREJUDICE.

16 It is so ordered.

17 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
18 to any party appearing *pro se* at said party's last known address.

19 Dated this 26th day of December, 2018.

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22 ROBERT J. BRYAN
23 United States District Judge
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